UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LINDA SMALL, an individual, and GARY SMALL, an individual,	§	
Plaintiffs,	§	Case No.: CIV-14-00493-JHP
v.	§	
CALIBER HOME LOANS, INC., a Delaware corporation,	§	
Defendant.	§	

DEFENDANT CALIBER HOME LOANS, INC.'S
COMBINED MOTION TO DISMISS AND OPENING BRIEF IN SUPPORT

MOTION

Defendant Caliber Home Loans, Inc. ("Caliber"), pursuant to Fed.R.Civ.P. 12(b)(6), respectfully moves the Court for an Order dismissing the Petition filed herein, which was removed to this Court from the District Court of Latimer County, State of Oklahoma on November 10, 2014. As shown below, plaintiffs Linda and Gary Small ("Plaintiffs") have not alleged sufficient facts to state a claim upon which relief may be granted.

BRIEF IN SUPPORT

INTRODUCTION

Plaintiffs owned a house in Latimer County, Oklahoma. It was collateral for a mortgage that Caliber serviced. (Petition at ¶ 4), Exh. 2 to Notice of Removal filed Nov. 10, 2014, Dkt. 3-2]. Plaintiffs did not insure their house as the mortgage required. As a result, Caliber told Plaintiffs on February 17, 2013 that it had renewed a lender-placed hazard insurance policy on the property in the amount of $60,900. (*Id*. at ¶ 5). Eight months later, on October 18, 2013, the

house burned. (*Id*. at ¶ 7). Plaintiffs want the proceeds of the policy, and sued Caliber, alleging several cause of action.

First, though Plaintiffs allege in the Petition that they knew at least 8 months prior to the day the house burned the amount of the policy that Caliber purchased, Plaintiffs claim that Caliber defrauded them because the policy it purchased and under which it was the named insured did not exceed the amount that Plaintiffs owed Caliber under the loan. (*Id*. at ¶¶ 6, 11 and 12).

Second, although Plaintiffs allege that Caliber was the named insured under the lender-placed policy it purchased, they allege that Caliber converted the policy proceeds by not giving them the money. (*Id.* at ¶¶ 10 and 13).

Third, Plaintiffs allege that Caliber, which was the named insured, rather than the insurer under the lender-placed policy, breached the insurance policy by not giving them the proceeds. (*Id.* at ¶ 14).

Fourth, Plaintiffs allege that Caliber, which is not an insurer, breached the implied covenant of good faith and fair dealing by not giving them the money it received as the named insured under the policy. (*Id.* at ¶ 15).

As demonstrated below, the Petition is inadequate under current federal pleading standards, and should be dismissed.

STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that any claim for relief by a plaintiff must contain "a short and plain statement of the claim showing that the pleader is entitled to relief…." However, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.3 (2007).

In *Twombly*, the United States Supreme Court reevaluated and refined the principles that govern the sufficiency of initial pleadings in a federal civil action. Abandoning the more lenient interpretations of the past, the Court concluded that the Federal Rules of Civil Procedure require a complaining plaintiff to offer some support for his or her claim to relief:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds for his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do….

Twombly, 550 U.S. at 555 (quotations and citations omitted). Rather, under the revised interpretation of the relevant rules, plaintiffs now have an obligation to provide "[f]actual allegations [that are] enough to raise a right to relief above the speculative level…." *Id*. (*citing* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004).

Two years later, in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 556 U.S. 662 (2009), the Court provided further guidance regarding the *Twombly* standard. In *Iqbal*, the Court first reaffirmed that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (*quoting Twombly*, 550 U.S. at 570). The Court then explained that a claim is "plausible on its face" only if the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (*citing Twombly*, 550 U.S. at 556). And, "[w]here a complaint pleads facts that are 'merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (*citing Twombly*, 550 U.S. at 557).

The *Iqbal* Court emphasized that generalized, conclusory pleading is not sufficient to state a valid claim for relief under the federal rules. Although Rule 8(a)(2) "marks a notable and

generous departure from the hyper-technical, code-pleading regime of a prior era…it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 1950 (*citing Twombly*, 550 U.S. at 556) (emphasis added). In evaluating a motion challenging the sufficiency of a purported claim, a court "'[is] not bound to accept as true a legal conclusion couched as a factual allegation,'" and a complaint that offers "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, [will] not suffice." *Iqbal*, 129 S.Ct. at 1949 (*citing Twombly*, 550 U.S. at 555). Nor is a complaint sufficient if it merely "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (*citing Twombly*, 550 U.S. at 557). Rather, to survive dismissal, a complaint must contain sufficient well-pleaded factual matter to state a claim to relief that is plausible on its face. *See id*., 129 S.Ct. at 1949-50.

The *Iqbal* decision results in a two-step approach to evaluate the sufficiency of a complaint. First, a court should "identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 1950-51. Second, the court should take the "well-pleaded factual allegations," "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. Only if the well-pleaded facts in the complaint, standing alone, establish the requisite "plausible" claim for relief will the complaint survive a pending motion to dismiss. But, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S.Ct. at 1950 (citations omitted) (emphasis added); *see also Royce v. Veteran Affairs Reg'l Office*, No. 08-cv-01993-KMT-KLM, 2009 WL 1904332, at *3 (D. Colo. July 1, 2009); *Licht v. Beta Eta Chapter of Kappa Alpha Order*, No. CIV 09-00012-M, 2010 WL 654329, at *2 (W.D. Okla. Feb. 22, 2010).

Here, the *Twombly* pleading standards apply to the removed state court petition. Fed.R.Civ.P. 81(c)(1); *Davenport v. Sugar Mountain Retreat, Inc.*, 2009 WL 3415240 at *2 (N.D. Okla. Oct. 16, 2009)(applying *Twombly* standard to removed Oklahoma state court petition). The allegations of the Petition in this case are insufficient to state a plausible claim for relief. The Court should dismiss it.

PROPOSITION I: PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUD AGAINST CALIBER.

In Paragraph 12 of the Petition, Plaintiffs allege that "Defendant Caliber Home Loans, Inc. committed fraud upon the Plaintiffs when they charged them a premium for an insurance policy that was classified as a hazard insurance policy and did not cover the entire unpaid principal and earned interest." There are several reasons this allegation fails to state a claim for "fraud," whether actual, constructive, common-law or statutory, under Oklahoma law.

First, although referenced in Paragraph 4 of the Petition as the sole basis for the parties' relationship, Plaintiffs fail to attach or cite a copy of the mortgage. The Tenth Circuit has held that "We agree with our sister circuits that if a defendant attaches to a 12(b)(6) motion materials referred to by the plaintiff and central to his claim, the court has discretion to consider such materials." *Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999). Moreover, the Court may, and Caliber requests that it does, take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment. *Chammat v. Fallis*, No. 13–CV–206–JED–PJC, 2014 WL 916749 at n.2 (N.D. Okla. Mar. 14, 2014)(holding that court could take judicial notice of matters of public record and consider such matters in connection with Rule 12(b)(6) motion).

Attached as Exhibit 1 hereto is a true and correct certified copy of the publicly-filed mortgage referred to in Paragraph 4 of Plaintiffs' Petition, which is self-authenticating under

Fed.R.Evid. 902 and admissible under Fed.R.Evid. 803(14). The Court can see that Plaintiffs agreed explicitly on Page 1 that "I will . . . maintain hazard insurance on the Premises <u>in your favor in a form and amount satisfactory to you . . . You may . . . purchase such insurance in your own name, if I fail to do so</u>." (Mortgage, Exh. 1 at page 1)[emphasis added]. The Mortgage itself demonstrates that the parties agreed the Lender could obtain a hazard policy in its own name and in an amount satisfactory to it. In short, there can be no fraud based upon Caliber acting in accordance with the terms of the mortgage.

Second, the allegations fail to meet the pleading standards of Fed.R.Civ.P. 9(b), which states, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." As the Tenth Circuit held in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006), "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud,' and must 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." As this Court has held, "Fraud allegations may not survive on vague assertions and general statements." *Pine Tele. Co., Inc. v. Alcatel-Lucent USA, Inc.*, No. CIV-11-353-JHP, 2014 WL 318331 at * 7 (E.D. Okla. Jan. 29, 2014).

The one sentence allegation set forth in Paragraph 12 of the Petition does not satisfy Rule 9(b). There is no allegation that, in contravention of the terms of the mortgage itself, anyone at Caliber ever suggested, asserted, implied, promised or otherwise represented to Plaintiffs that the lender-placed hazard insurance policy it obtained on its own behalf would be in an amount sufficient to cover all amounts owed under the loan. Specific allegations of who said something to this effect, what they said, when they said it, where they said it, and how it was

communicated, is required under Fed.R.Civ.P. 9(b) as interpreted by the Tenth Circuit. Absent such specificity, Plaintiffs' fraud claim should be dismissed.

Third, Plaintiffs allegations confuse and conflate a *hazard* insurance policy with a *private mortgage* insurance policy. A hazard policy is, put simply, a casualty or property policy intended to protect the lender's interest in the *collateral* that secures its loan which, in the case of a home, may be subject to loss. On the other hand, a separate kind of insurance exists to cover a borrower's inability to satisfy the amounts due under the loan. That type of insurance is called private mortgage insurance. *See, e.g., In re Lanois*, 516 B.R. 680 n. 1 (Bankr. D. R.I. 2014)("Private mortgage insurance has been defined as '[a]n agreement to provide money to the lender if the mortgagor defaults on the mortgage payments.' Black's Law Dictionary 924 (10th ed. 2014)"). There is no obligation under the mortgage on the part of the Plaintiffs to maintain private mortgage insurance to cover the amount owed under the loan, and no obligation on the part of the lender to obtain such a policy if the Plaintiffs failed to do so. Plaintiffs' fraud claim, if allowed to proceed, would attempt to convert a hazard policy intended to protect the lender's interest in the collateral into an all-encompassing mortgage insurance policy intended to protect the buyer's liability for satisfaction of its payment obligations under the loan. A hazard policy insures the lender's interest in the collateral, not the borrower's liability for payment of the loan itself.

Fourth, it is unlikely that any insurer would underwrite or otherwise provide hazard coverage for collateral based on a borrower's ever-changing loan balance as opposed to the value of the property itself. To do so would be impossible in many instances due to 36 O.S. § 4804, which states, in relevant part, "No insurance company shall, knowingly, issue any fire insurance

policy upon property within this state for an amount which, with any existing insurance thereon, exceeds the fair value of the property."

Fifth, even if a hazard policy could be obtained in the amount of the loan balance, the notion that a lender must obtain a lender-placed *hazard* policy in an amount sufficient to satisfy the total amount owed under the loan would be patently unrealistic and unworkable. For example, in situations in which a borrower fails to maintain its own private hazard insurance on the mortgaged collateral, it is often the case that the borrower is also in default with respect to its obligation under the loan documents to make monthly payments of principal and interest. As payments are missed, interest on the loan continues to accrue, default interest often begins to accrue, late fees accumulate, taxes go unpaid necessitating protective advances, etc. Under these circumstances, a lender would each month have to increase the amount of insurance coverage to account for additional accrued but unpaid interest, late fees, default interest, protective advances, and the like with no regard to the value of the collateral.

Sixth, Plaintiffs own allegations make clear that "on February 17, 2013, the Plaintiffs were notified by Defendant Vericrest Financial, Inc., now Caliber Home Loans, Inc., that Defendant Vericrest had renewed lender-placed hazard insurance on the above-described property with coverage of $60,900, effective February 1, 2013 through February 1, 2014 . . ." (Petition at ¶ 5). If Plaintiffs believed that more hazard insurance coverage was warranted, they were aware of the amount of coverage provided under the lender-placed policy some 8 months prior to the date their home burned. (*Id.* at ¶ 7). They could have requested higher coverage or, as they were obligated to do under the mortgage, could have sought and obtained their own hazard policy on the private market, or could have sought private mortgage insurance. As the Supreme Court of Oklahoma held in *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 519 P.2d

491, 495 (Okla. 1974), a fraud claim requires that the plaintiff actually rely upon the alleged misrepresentation. However, "the reliance referred to must be justifiable. [T]o be remediable, a representation must have been of such a nature and made under such circumstances that the injured party had a right to rely upon it." [citations omitted].

Here, Plaintiffs allege they *knew* the exact amount of coverage provided under the lender-placed hazard insurance policy *8 months before the loss*. There can be no fraud relating to the amount of coverage provided when Plaintiffs allege in the Petition they were aware of how much coverage was provided long before the loss occurred.

PROPOSITION II: PLAINTIFFS FAIL TO STATE A CLAIM FOR CONVERSION.

Plaintiffs allege in Paragraph 13 that "Defendant Caliber Home Loans, Inc. has converted insurance funds due and payable to the Plaintiffs without endorsement by the Plaintiffs." There are no facts allegations in the Petition that the check from the insurer was issued jointly to Plaintiffs nor that the funds were otherwise "due and payable to the Plaintiffs."

In *White v. Webber-Workman Co*., 591 P.2d 348, 350 (Okla. Ct. App. 1979), the court held that "In terms of essential elements, one seeking damages for conversion must plead and prove (a) he owns or has a right to possess the property in question, (b) that defendant wrongfully interfered with such property right, and (c) the extent of his damages."

Plaintiffs have failed to allege any facts to demonstrate that they own or otherwise have the right to the proceeds of the lender-placed insurance policy. There is no allegation that Plaintiffs paid for the policy, that they reimbursed Caliber for the amounts it paid, that they were the named or additional insured under the policy, or that the check was made jointly payable to Caliber and Plaintiffs. Instead, Paragraph 5 of the Petition makes clear that "Vericrest Financial,

Inc. [was] the Named Insured." As alleged in the Petition, Caliber was formerly known as Vericrest Financial, Inc. (Petition at ¶ 3).

In addition, even if Plaintiffs had alleged such a right, there are no facts to support the notion that Caliber has *wrongfully* exercised dominion or control of the proceeds of a policy it obtained, paid for, and upon which it was the named insured. Plaintiffs have two inconsistent complaints. First, Plaintiffs allege they have not received the proceeds for the "repair, construction or building of their home." (Petition at ¶ 10). Second, Plaintiffs also complain that "none of the proceeds from the insurance policy have applied [sic] to the unpaid balance and earned interest on said account." (¶ at ¶ 11).

In other words, even if Plaintiff were entitled to the benefit of the proceeds, it is entirely unclear what Caliber has done *wrong* in the absence of an allegation of a specific demand by Plaintiffs to either (a) use the funds to repair or replace the home; or (b) to instead apply the proceeds to the amounts due under the loan. Plaintiffs do not allege, for example, that they demanded that the funds be used for repair or replacement, but under some theory Caliber wrongfully applied the funds to the loan balance. Conversely, Plaintiffs do not allege that they demanded application of the proceeds to the loan balance, but Caliber refused and insisted that in order to utilize the funds Plaintiffs had to repair or replace their home.

PROPOSITION III: PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF THE LENDER-PLACED INSURANCE POLICY.

Plaintiffs allege in Paragraph 14 of the Petition that "Defendant Caliber Home Loans, Inc. has not complied with the terms and conditions of the insurance policy in providing funds to the Plaintiffs to construct and rebuild their burned home."

Plaintiffs cannot allege a claim for breach of the insurance policy. First, they do not allege that they are parties to, or named or additional insureds under, the insurance policy so as

to confer standing to sue. Instead, as Plaintiffs allege in Paragraph 5 of the Petition, Caliber (formerly Vericrest Financial, Inc.) was the named insured.

Second, Caliber is the named *insured* and not the *insurer*. Given that the courts have held that a mortgagor who is neither a named insured, an additional insured or a third-party beneficiary of a force-placed policy has no standing to sue the *insurer*, *see e.g.*, *Trevino v. Evanston Ins. Co*., Civil Action No. M-11-18, 2011 WL 2709063 (S.D. Tex. July 12, 2011), it goes almost without saying that a borrower may not sue the *lender* for breach of the policy. Put simply, *Caliber was the named insured* and had no obligations to Plaintiffs under the policy.

PROPOSITION IV: PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiffs cannot state a claim for breach of the implied covenant of good faith and fair dealing as alleged in Paragraph 15 of the Petition.

First, this is not a bad-faith insurance case. Caliber is not an insurer. Instead, Plaintiffs allege it is a "mortgage broker and mortgage lender." (Petition at ¶ 2).

Second, in *Embry v. Innovative Market Systems, Inc.*, 247 P.3d 1158, (Okla. 2010), the Oklahoma Supreme Court has stated "This Court has indeed expressed reluctance to extend tort recovery for bad faith beyond the insurance field. However, an insurance contract is not required to support tort liability for bad faith but instead such liability depends upon the existence of a "special relationship" under a contract (like the "special relationship" of an insurer and insured). The "special relationship" that gives rise to tort liability for bad faith is marked by (1) a disparity in bargaining power where the weaker party has no choice of terms, also called an adhesion contract, and (2) the elimination of risk.

Nowhere in the Petition do Plaintiffs allege the existence of a contract relating to their claim that they contend was an "adhesion contract." And, in any event, Plaintiffs nowhere allege, nor can they, that they had "no choice of terms" with regard to the policy as they were in no way, shape or form precluded from obtaining hazard insurance on the private market and, as set forth in the Mortgage, they actually had an affirmative obligation to do so.

CONCLUSION

For the reasons set forth above, defendant Caliber Homes Loans, Inc. requests that the Court dismiss the petition removed to this Court from the District Court of Latimer County, State of Oklahoma pursuant to Fed.R.Civ.P. 12(b)(6).

DATED: November 11, 2014

Respectfully submitted,

/s/ John D. Stiner

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ATTORNEYS FOR DEFENDANT CALIBER HOME LOANS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on counsel of record for plaintiffs Linda Small and Gary Small as listed below, on this 11th day of November 2014, via the Court's ECF system and via first-class mail with postage prepaid thereon.

Richard C. Lerblance
P.O. Box 1011
Hartshorne, OK 74547

/s/ John D. Stiner
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